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No.: _____

SUPREME COURT, U.S.
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IN THE

Supreme Court of the United States

October Term, 1986

BENARSI DAS MEHRA, and
FAR EASTERN MERCHANTS, INC.,
Petitioners,

-against-

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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Questions Presented

1. Does the inadvertent delivery of sealed packages to a third party constitute an abandonment of the sender's Fourth Amendment expectation of privacy in that property?

List of Parties

Apart from the petitioners, there are no other parties to this action.

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-against-

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioners Benarsi Das Mehra and Far Eastern Merchants, Inc. respectfully pray that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the Fourth Circuit, entered on July 24, 1987, affirming their convictions for violating 21 U.S.C. § 952(a), 21 U.S.C. § 963, and 18 U.S.C. § 1952(a)(3).

Opinions Below

The judgment of the Court of Appeals for the Fourth Circuit, reported as *United States v. Mehra*, 824 F.2d 297 (4th Cir. 1987), is reprinted in the appendix at pages 1a-7a. The order of the District Court, which is unreported, appears at 8a-11a.

Jurisdiction

The judgment of the Court of Appeals for the Fourth Circuit was entered on July 24, 1987, and this petition for a writ of certiorari was filed within sixty days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

Constitutional and Statutory Provisions

United States Constitution, Amendment IV:

> **Right of Search and Seizure Regulated.**
>
> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Title 21, United States Code:

> **§ 952. Importation of controlled substances**
>
> **Controlled substances in schedules I or II and narcotic drugs in schedules III, IV, or V; exceptions**
>
> (a) It shall be unlawful to import into the customs territory of the United States from any place outside thereof (but within the United States), or to import into the United States from any place outside thereof, any controlled substance in schedule I or II of subchapter I of this chapter, or any narcotic drug in schedule III, IV, or V of subchapter I of this chapter, except that—

(1) such amounts of crude opium, poppy straw, concentrate of poppy straw, and coca leaves as the Attorney General finds to be necessary to provide for medical, scientific, or other legitimate purposes, and

(2) such amounts of any controlled substance in schedule I or II or any narcotic drug in schedule III, IV, or V that the Attorney General finds to be necessary to provide for the medical, scientific, or other legitimate needs of the United States—

(A) during an emergency in which domestic supplies of such substance or drug are found by the Attorney General to be inadequate,

(B) in any case in which the Attorney General finds that competition among domestic manufacturers of the controlled substance is inadequate and will not be rendered adequate by the registration of additional manufacturers under section 823 of this title, or

(C) in any case in which the Attorney General finds that such controlled substance is in limited quantities exclusively for scientific, analytical, or research uses,

may be so imported under such regulations as the Attorney General shall prescribe. No crude opium may be so imported for the purpose of manufacturing heroin or smoking opium.

§ 963. Attempt and conspiracy

Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

(Pub. L. 91-513, Title III, § 1013, Oct. 27, 1970, 84 Stat. 1291.)

Title 18, United States Code:

§ 1952. Interstate and foreign travel or transportation in aid of racketeering enterprises

(a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to—

(1) distribute the proceeds of any unlawful activity; or

(2) commit any crime of violence to further any unlawful activity; or

(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,

and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

(b) As used in this section "unlawful activity" means (1) any business enterprise involving gambling, liquor on which the Federal excise tax has not been paid, narcotics or controlled substances (as defined in section 102(6) of the Controlled Substances Act), or prostitution offenses in violation of the laws of the State in which they are committed or of the United States, or (2) extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States.

(c) Investigations of violations under this section involving liquor shall be conducted under the supervision of the Secretary of the Treasury.

(Added Pub.L. 87-228, § 1(a), Sept. 13, 1961, 75 Stat. 498 and amended Pub.L. 91-513, Title II, § 701(i)(2), Oct. 27, 1970, 84 Stat. 1282.)

Statement of the Case

Defendants Benarsi Das Mehra and Far Eastern Merchants, Inc. seek review of the Fourth Circuit's affirmance of a judgment of conviction entered in the United States District Court for the Middle District of North Carolina, Greensboro Division (Erwin, J.), on June 24, 1986, adjudging both defendants guilty of conspiring to import hashish (Count One, 21 U.S.C. § 963), two charges of importing hashish (Counts Two and Three, 21 U.S.C. § 952(a)), and one Travel Act violation (Count Four; 18 U.S.C. § 1952(a)(3)). As a result of this conviction, Mr. Mehra was sentenced to seven years imprisonment and a $250,000 fine on Count One; concurrent terms of seven years imprisonment, to run consecutively to the sentence imposed on Count One, and a $250,000 fine on Counts Two and Three; and a term of five years probation, to commence following his release from imprisonment, on Count Four. In sum, he was sentenced to 14 years imprisonment and fined $500,000. As for Far Eastern Merchants, the company was fined a total of $460,000.

Statement of the Facts

This case focuses upon two separate shipments of hashish that were found inside materials imported from India into the United States by defendant Far Eastern Merchants. For the purposes of this petition, the only relevant factors are those which relate to the government's seizure of hashish. As there were no accomplice witnesses who testified, suppression of the hashish as evidence would have barred prosecution of petitioners.

In 1983, Far Eastern Merchants, which had a warehouse in High Point, North Carolina, shipped 100 rolls of fabric to Synthetic Finishing Company ("Synthetic") for processing and then delivery to Far Eastern's customer, Eastern Handwoven. (T:1-86)[1] As the employees were

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[1] The letter "T" refers to pages of the trial transcript.

unraveling one of the rolls of fabric, nine "tightly bound" sealed packages were found inside. (T:1-86) Upon making this discovery, Synthetic employees summoned Robert L. Innes, a special agent with the North Carolina State Bureau of Investigation, to investigate. (T:2-6 to 2-7) The Synthetic employees told Innes how they had discovered the packages and, as a result, Innes took them. (T:2-7) Later that afternoon, without asking anyone's permission (T:16), he opened the packages at his office. (T:2-7) Inside, Innes found approximately 20 pounds of hashish.

Four days later, on October 11, 1983, Innes questioned Narayanan Rajagopalan, the man who would ultimately become the government's chief witness. At this time, Rajagopalan, the only Far Eastern employee in North Carolina (T:2-28), was a subject of the investigation. (T:2-16 to 2-17) This questioning, however, did not lead to the arrest of Mr. Rajagopalan or anyone else. That Mr. Mehra was not arrested is not surprising in that Rajagopalan in no way suggested to Agent Innes that he had any suspicions about his employer. (T:2-37)

Nonetheless, despite the fact that no one was arrested, Rajagopalan went to visit his close friend, Bud Turcot.[2] According to Rajagopalan, he told Turcot:

> I am very much concerned, I knew I have a family here, and because the officers have questioned me that I would be wrongly arrested and my wife and three kids would be stranded. I am very much concerned. I do not want to work like the Mafia. I feel like quitting the job, and it might even affect my immigration. I may even be deported.

(T:2-36 to 2-37)

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[2] Turcot was the owner of Century Fabrics, the company that marketed Far Eastern's fabric. (T:1-103 to 1-104) He had become friendly with Rajagopalan because Century had stored Far Eastern's product in its warehouse until Far Eastern obtained its own warehouse in March of 1985. (T:1-108) Hence, from January of 1983 until March of 1985, the two men worked in the same building. (*Id.*)

Yet, Rajagopalan did not resign. Instead, he called petitioner Mehra, who was in India at the time, and told him that hashish had been found in the fabric. According to Rajagopalan, Mehra said that "he would take care of me" (T:2-36) but then never mentioned the incident again. (T:2-36 to 2-37) By all outward indications, Rajagopalan did not appear to be suspicious of his employer. For the next three years, he remained in Far Eastern's employ, never suggesting to any law enforcement authority that Mehra might be involved in the importation of hashish.

Yet, according to Rajagopalan, he was concerned. While continuing to work for Far Eastern, and enjoying the use of a car (T:2-99) and the benefit of a $10,000 interest-free loan (T:2-100), he was becoming suspicious of Mr. Mehra. Rajagopalan testified that, on a number of occasions, Mehra asked him to ship specific bales of material directly to New York, rather than having them first finished at a plant in North Carolina. This suspicion was fueled by certain alleged facts about the 1983 incident *which Rajagopalan had neglected to tell Agent Innes.* (T:2-17) According to Rajagopalan, 100 rolls of fabric had initially been shipped to Synthetic. (T:2-33) Shortly thereafter, though, Mehra reportedly made a number of frantic calls to Rajagopalan, telling him that the wrong fabric had been sent. As a result, Synthetic returned 67 of the 100 rolls to Far Eastern on October 5 or 6 (T:2-34), one or two days before the hashish was found. In the interim, between the time Synthetic returned the fabric and Rajagopalan learned of the hashish, Mehra supposedly came down to North Carolina to inspect the bales. (T:2-34) After this inspection, the rolls were then returned to Synthetic.

Rajagopalan's "suspicions" began to grow and, in February of 1986, finally blossomed. Rajagopalan testified that, on February 24, 1986, Ben Mehra phoned him and told him that he must send 60 rolls of material to New York, rather than to Far Eastern's finisher. Mehra supposedly gave Rajagopalan specific instructions as to which rolls should be shipped. (T:2-44) The next day, Rajagopalan called Pilot Transportation ("Pilot") to take

the bales to New York. (T:2-52) But he was troubled and, on that same day, he went to speak to his friend, Bud Turcot. According to Rajagopalan, "I told him about the 1983 incident where the officers found some hashish in the Hickory Synthetic Finishing, and I also told him about the later shipments of three or four times -- the specific numbers of bales to be sent to New York unbacked to his office . . . ." (T:2-56) Saying that he was "very much concerned," he expressed an interest in speaking to law enforcement authorities. (*Id.*) At this point, Turcot arranged a meeting with the police. (T:2-56 to 2-57) At this meeting, Rajagopalan told the police "about my suspicion about this particular shipment going to New York, and the previous -- 1983 incident I narrated -- and also the other shipments he had asked me to send. So I said I had a very strong suspicion that there is something wrong with the shipment." (T:2-58)

Government agents then arranged for a "dog sniff" of the bales, which were then at Pilot's warehouse. Following a positive reaction by the dog, a search warrant was obtained and 1,200 pounds of hashish were found.

Prior to trial, petitioners sought unsuccessfully to suppress the fruits of both the 1983 search at Synthetic, which yielded the seizure of approximately 20 pounds of hashish, and the fruits of the February 26, 1986 search at Pilot, which yielded approximately 1,200 pounds of hashish. The Court of Appeals affirmed the trial court's denial of the suppression motion. In this petition, petitioners maintain that the trial court erroneously denied these suppression motions and the Court of Appeals should have reversed that ruling. Specifically, petitioners contend that the 1983 warrantless search at Synthetic was illegal and that this illegality in turn wholly tainted the 1983 search at Pilot. Indeed, both the trial court and the Court of Appeals recognized that the validity of the 1986 search was entirely dependent upon a finding that the 1983 search was legal. In holding that the search warrant issued for the 1986 search was supported by probable cause, the trial court relied upon

the fact that a trained dog had detected drugs in the searched property. Recognizing that "[t]he use of a trained dog to detect drugs [must be] based upon reasonable suspicion of the presence of drugs . . . [*s*]*ee United States v. Place,* 462 U.S. 693 (1983)", the Court held that "[t]he fact that drugs were seized in 1983 from similar fabric as that found on the truck establishes the reasonable suspicion of drugs necessary to justify the use of a drug detecting dog." The Court of Appeals agreed, stating:

> In 1986, government agents, alerted by one of Mehra's employees, seized a large quantity of drugs concealed in rolls of fabric that Mehra had imported. Mehra contends that this search was illegal because the warrant authorizing it was based in part on the 1983 search. In view of our conclusion that the 1983 search was proper, the 1986 search was also valid.

(6a)

Hence, the legality of the 1986 search was solely dependent upon the 1983 search. If, as petitioners contend, the 1983 search was illegal, then the fruits of the 1986 search must also be suppressed because, without that search, there would have been no basis for obtaining the 1986 search warrant.

A. The Suppression Hearing

The key witness at the suppression hearing was Robert L. Innes, a special agent with the North Carolina State Bureau of Investigation. (ST:7-8)[3] Innes testified that, in October of 1983, Danny Earnhardt, Synthetic's administrator, called him and told him that "some employees had found what they thought to be drugs while processing some material at the plant . . . ." (ST:8-9) When Innes arrived, he was shown nine packages that were *closed and sealed.* (ST:12) At this time, he did not know who the owner of the material was. (ST:14) Nonetheless, he "picked the material up" and left with it unopened. (ST:14) Hours

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[3] The letters "ST" refer to pages of the suppression hearing transcript.

later (ST:25-26), Innes opened the packets. (ST:16) At this time, he knew that the packages had come from Far Eastern. (ST:18), Yet, *he did not ask anyone at Far Eastern or anyone at Synthetic for permission to open the packages.* (ST:17) Nor, did he obtain a warrant before searching the contents of the packages. (ST:17) Rather, even though he considered the packages to be "safe and secure" in his office (*id.*), he opened them without permission from anyone or authorization from a court. Upon opening them, he found 20 pounds of hashish.

The 1983 seizure, which did not result in any arrests, led directly to the search warrant that was issued in connection with the 1986 seizure at Pilot. As the affidavit submitted in support of the application for a search warrant makes clear, the basis for the search warrant was (1) the 1983 seizure and (2) the positive reaction by the government's drug detection dog. This analysis of the search warrant was concurred in both by the testimony of DEA agent John Ingram (ST:39-40), the agent who made the application for the search warrant, and by the trial court.

B. The Trial Court's Ruling

As noted, the trial court upheld the 1986 search and seizure upon a finding that the 1983 warrantless seizure was valid. The Court ruled that the second prong of the government's 1986 probable cause showing -- the dog sniff -- was itself justified only by virtue of the 1983 seizure. This conclusion was inevitable given that Customs was so thoroughly searching Far Eastern's imports. (T:4-35 to 4-36) There hardly would be good reason to suspect that drugs were hidden inside fabric that had been under such close scrutiny at the border. As to the 1983 seizure, the Court stated:

> The court finds that Synthetic Finishing Company officials had sufficient authority to consent to the seizure and search of the packages that were inadvertently discovered during the processing of fabric. After completion of the pro-

cessing, the fabric was to be shipped to another company. Thus, it is clear that defendant Far Eastern Merchants, Inc., had relinquished any control over the fabric. Likewise, defendants had no legitimate expectation of privacy in the fabric that it delivered to Synthetic Finishing Company to be processed. *See United States v. Bellina,* 665 F.2d 1335 (4th Cir. 1981); *United States v. Jacobsen,* 466 U.S. 109 (1984).

(10a)

C. The Court of Appeals' Ruling

The Court of Appeals did not reach the issue of consent because it found that, by sending the rolls of fabric to Synthetic, petitioners surrendered their expectations of privacy in the sealed packages that, obviously, were inadvertently packed inside the rolls. In essence, the Court found that petitioners had "abandoned" the hashish.

Reasons for Granting the Writ

The question of what constitutes abandonment for Fourth Amendment purposes is a question that is both unresolved and of great interest to this Court. *See California v. Rooney,* ____ U.S. ____ , 107 S.Ct. 2852 (1987). Hence, on June 26, 1987, this Court agreed to consider whether "warrantless trash searches of discarded garbage violate [the] Fourth and Fourteenth Amendments?" *California v. Greenwood,* ____ U.S. ____, 41 Crim. Law Rep. 4081 (July 1, 1987).

This case poses a more complex and troubling question than the one presented by *Greenwood.* For here, unlike *Greenwood,* petitioners *unintentionally* relinquished control over packages which were carefully sealed to prevent inspection. Here, the loss of privacy was a mistake, rather than the result of an affirmative act.

" 'The abandonment of property is the relinquishing of all title, possession or claim to or of it -- *a virtual intentional throwing away of it.*' " *United States v.*

Cowan, 396 F.2d 83, 87 (2d Cir. 1968) (*quoting Foulke v. New York Consol. R.R. Co.*, 228 N.Y. 269, 273, 127 N.E. 237, 238 (1920)) (Emphasis supplied). The key issue where the government raises a claim of abandonment is "whether the person prejudiced by the search had voluntarily discarded, left behind, or otherwise relinquished his interest in the property in question so that he could no longer retain a reasonable expectation of privacy with regard to it at the time of the search." *United States v. Colbert*, 474 F.2d 174, 176 (5th Cir. 1973); *accord United States v. Jackson*, 544 F.2d 407, 409 (9th Cir. 1976) (citing *Colbert*); *City of St. Paul v. Vaughn*, 306 Minn. 337, 237 N.W.2d 365 (1975) ("In essence, what is abandoned is not necessarily the defendant's property, but his reasonable expectation of privacy therein."); *State v. Philbrick*, 436 A.2d 844, 854 (S.Ct. Me. 1981) ("Abandonment in the constitutional sense . . . exists only if the defendant has voluntarily discarded the property, left it behind, or otherwise relinquished his interest therein under circumstances indicative of his foregoing any further reasonable expectation of privacy with regard to it at the time of the search.").

In determining whether there has been a relinquishment of a privacy interest, courts should tread lightly:

> The concept of privacy is paramount in deciding a claimant's standing to invoke the protection of the Fourth Amendment. Courts should be hesitant to narrow the concept because in this society, the sphere of personal privacy has become more and more confined. In a real sense, if courts begrudge the scope of the privacy expectations of the populace, not only will there be less and less freedom of the person, but his or her expectations of freedom will wither and with them the values of individuality and privacy from increasingly intrusive governmental control.

United States v. Kahan, 350 F.Supp. 784, 793-94 (S.D.N.Y. 1972), *aff'd in part and rev'd in part on other grounds*, 479 F.2d 290 (2d Cir. 1973), *rev'd on other grounds*, 415 U.S. 239 (1974).

Ultimately, whether the property has been abandoned "is a question of intent, which 'may be inferred from words spoken, acts done, and other objective facts.' " *United States v. Jones*, 707 F.2d 1169, 1172 (10th Cir. 1983); *United States v. Moody*, 485 F.2d 531, 534 (3rd Cir. 1973); Ringel, *Searches and Seizures, Arrests and Confessions*, § 8.4(a) at 8-31 (1986). Because of traditional concerns about restricting the scope of privacy interests, abandonment " 'is not presumed.' " *United States v. Cowan, supra.* "Proof of abandonment must be made by the one asserting it by clear, unequivocal and decisive evidence." *Friedman v. United States*, 347 F.2d 697, 704 (8th Cir. 1965); Ringel, *supra*, § 8.4(a) at 8-31.

Here, there was no such proof. While the courts below arguably were correct in concluding that petitioners relinquished their privacy interest in the *fabric* that had been shipped to Synthetic, the same cannot be said of the *sealed* packages that were found inside of the fabric. If, as we must in this petition, assume the truth of the government's testimony, it is clear that Mr. Mehra exhibited exactly the opposite intent. According to Narayanan Rajagopalan's trial testimony, the fabric was shipped to Synthetic on October 3, 1983, at Mr. Mehra's request. (T:2-33) Shortly thereafter, though, Mehra made a number of frantic calls to Rajagopalan, telling him that the wrong fabric had been sent. (*Id.*) As a result, Synthetic returned 67 of the 100 rolls to Far Eastern on October 5 or 6. (T:2-34)[4] On October 7, the packages were found inside one of the rolls of fabric left at Synthetic.

In its summation, the government argued that Mr. Mehra's attempts to retrieve the material from Synthetic supported the inference that he knew that there was hashish inside the material, had mistakenly sent it to Synthetic, and then sought to avoid detection by having

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[4] At the suppression hearing, Agent Innes testified that Rajagopalan had told him in 1983 that he had recalled 67 rolls of fabric from Synthetic at Mehra's request. (ST:20)

them sent back to Far Eastern. (T:4-138) The government now must live with that inference, one that wholly undermines any suggestion that petitioners *intentionally and voluntarily* terminated their right of privacy in the packages found inside the material. To the contrary, assuming the truth of Rajagopalan's testimony about Mehra's efforts to retrieve the fabric, the proof showed that petitioners actively sought to protect the roll containing hashish from intrusion but inadvertently failed to retrieve it. This is hardly the type of action which evidences the intent of abandonment required by the Fourth Amendment.

Moreover, even if the proof had not shown Mr. Mehra to have so actively sought the return of the fabric, proof of abandonment nonetheless would have been insufficient. By shipping the fabric to Synthetic, it would be reasonable to conclude that petitioners relinquished a privacy interest in the fabric itself. However, it would be wrong to conclude that petitioners relinquished a privacy interest in sealed packages contained inside the fabric, packages which obviously were inadvertently sent to Synthetic. As the Court noted in *United States v. Humphrey,* 456 F.Supp. 51, 62 (E.D.Va. 1978), *aff'd sub nom., United States v. Truong Dinh Hung,* 629 F.2d 908 (4th Cir. 1980), "steps such as covering [property] with a binder or more likely, sealing or affxing a seal [is] the sort of behavior consistent with the concern for the privacy of the [property] contained within." Here, by sealing the hashish in a manner that made it impossible to determine what was inside without opening the package, the petitioners made clear their desire that the contents not be viewed by others, especially the police. *Cf. United States v. Van Leeuwen,* 397 U.S. 249 (1970) (One who sends a package via first class mail retains a privacy interest in the contents and the package cannot be opened by government officials in the absence of a search warrant.).

Ultimately, the issue here is whether a person relinquishes his right to privacy in an object where the facts

unequivocally show that his "abandonment" of that object was wholly inadvertent. A simple analogy demonstrates our position. Suppose that, instead of sealed packages, Mr. Mehra's wallet, containing money, credit cards and other personal effects, had been inadvertently included in the shipment to Synthetic. No one could rationally say that, by this mistake, Mr. Mehra had "abandoned" his right to privacy regarding that wallet. The same conclusion applies to the facts of this case, where the facts show that the shipping of the hashish to Synthetic was clearly inadvertent and that Mr. Mehra never had an intention to abandon his right not to have those packages opened by the government in the absence of a search warrant.

Unequivocal support for this argument is found in *Walter v. United States*, 447 U.S. 649 (1980). In *Walter*, packages were mistakenly delivered to a company bearing the same name as the intended recipient. When company employees opened each package, they found individual film boxes which clearly identified the contents as containing explicit homosexual films. After the recipients attempted unsuccessfully to view portions of the films by holding them to the light, they called the FBI. An agent came and took possession of the films. "Thereafter, without making any effort to obtain a warrant or to communicate with the consignor or consignee of the shipment, FBI agents viewed the films with a projector." 447 U.S. at 652. This Court held that this action violated the Fourth Amendment. Rejecting a claim "that because the packages had been opened by a private party, thereby exposing the descriptive labels on the boxes, petitioners no longer had any reasonable expectation of privacy in the films," 447 U.S. 658, Justice Steven's plurality opinion stated:

> The 12 cartons were securely wrapped and sealed, with no labels or markings to indicate the character of their contents. There is no reason why the consignor of such a shipment would have any lesser expectation of privacy than the consignor

> of an ordinary locked suitcase. The fact that the cartons were unexpectedly opened by a third party before the shipment was delivered to its intended consignee does not alter the consignor's legitimate expectation of privacy. The private search merely frustrated that expectation in part. It did not simply strip the remaining unfrustrated portion of that expectation of all Fourth Amendment protection.

447 U.S. at 658-59.

This case is very similar to, and, therefore, controlled by, *Walter*. As in *Walter*, petitioners' packages ended up in the wrong hands. This error cost petitioners some Fourth Amendment protection in that the existence of the packages became known. But this partial loss of privacy did not eviscerate all Fourth Amendment rights.[5] Just as the petitioner in *Walter* retained the right not to have the films viewed without a warrant, petitioners here had the right not to have the packages opened without a warrant.

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[5] It is this fact -- that the government's invasion of privacy *exceeded* that undertaken by Synthetic's employees -- which distinguishes this case from *United States v. Jacobsen*, 466 U.S. 109 (1984). In *Jacobsen*, employees of a private freight carrier opened a damaged package and found tubes of a white powdery substance. They then placed the tubes back in the package and called the DEA. When the DEA agent arrived, he opened up the package again. The Court upheld this search of the package precisely because it did not exceed the earlier invasion of privacy by the freight carrier's employees. Relying on *Walter*, which it read, as petitioners do here, to hold that "additional invasions of . . . privacy . . . must be tested by the degree to which they exceeded the scope of the private search," 466 U.S. at 115, the Court stated: "*The Fourth Amendment is implicated only if the authorities use information with respect to which the expectation of privacy has not already been frustrated.*" 466 U.S. at 117 (Emphasis supplied). Here, of course, petitioners' privacy interest in the *sealed* packages had not yet been "frustrated" by Synthetic's employees when they were opened by Agent Innes.

This case thus stands in marked contrast to those cases where courts have found an abandonment because (1) the defendant placed the seized property in a trash bag and left it for garbage collection, *United States v. Crowell,* 586 F.2d 1020, 1024-25 (4th Cir. 1978), the defendant affirmatively disclaimed ownership when questioned about it, *United States v. Colbert, supra,* 474 F.2d at 177, or the defendant dropped a package and then ran away from it. *Hester v. United States,* 265 U.S. 57 (1924). *See generally United States v. Cella,* 568 F.2d 1266, 1283 (9th Cir. 1977). It is this contrast -- that Mr. Mehra took no steps which even suggested an intentional, rather than an inadvertent, loss of control over the packages -- which eliminates abandonment as justification for Agent Innes' warrantless search.

Conclusion

For the foregoing reasons, a writ of certiorari should issue to review the judgment of the Court of Appeals for the Fourth Circuit.

Respectfully submitted,

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APPENDICES

Appendix A
Opinion of United States Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 86-5105

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

BENARSI DAS MEHRA;
FAR EASTERN MERCHANTS, INC.,
Defendant-Appellant.

Appeal from the United States District Court for the Middle District of North Carolina, at Greensboro. Richard C. Erwin, District Judge. (CR-86-38-G)

Argued: February 3, 1987 Decided: July 24, 1987

Before WINTER, Chief Judge, PHILLIPS, Circuit Judge, and BUTZNER, Senior Circuit Judge.

Judd Burstein (Robert F. Katzberg, Kaplan & Katzberg; Michael L. Lee on brief) for Appellants; David Bernard Smith, United States Attorney (Kenneth W. McAllister, United States Attorney; Becky M. Strickland, Paralegal Specialist on brief) for Appellee.

Appendix A
Opinion of United States Court of Appeals

BUTZNER, Senior Circuit Judge:

Benarsi Das Mehra and Far Eastern Merchants, Inc. (collectively Mehra) appeal a judgment convicting them of conspiring to import hashish, in violation of 21 U.S.C. § 963, importation of hashish, in violation of 21 U.S.C. § 952(a) and 18 U.S.C. § 2, and interstate travel in aid of racketeering, in violation of 18 U.S.C. § 1952(a)(3). Mehra claims that the district court erred in upholding the validity of two searches and seizures of hashish, occurring in 1983 and 1986, and in the admission of a prior consistent statement of a government witness.

I

Mehra and his textile company, Far Eastern Merchants, Inc., imported hand woven Indian cottons into this country from India. Unfinished bales of fabric arrived from India at Far Eastern's warehouse in High Point, North Carolina, and were then sent either to a fabric finishing company for processing or directly to a customer. The finishing company unrolled the bales, processed and backed the fabric, and delivered the finished fabric to purchasers designated by Far Eastern.

The fabric involved in the 1983 search consisted of 100 rolls of cotton that Mehra imported from India and then sold to Eastern Handwoven. Synthetic Finishing picked it up from Far Eastern at High Point to process the material and deliver it to Eastern Handwoven.

On October 7, 1983, employees of Synthetic Finishing were processing the last of 33 rolls of this fabric in the lapper, a device for unrolling the material, when the roll became hung in the machine, causing it to stop. The employees discovered that the cloth had been cut to form a window, and nine packages wrapped in wax paper were inside tied to the remainder of the roll. An employee reported to the State Bureau of Investigation

that they had found what they thought to be drugs while processing material at the plant and requested that an agent come to the plant.

Synthetic gave the cut roll of fabric and the packages to the SBI agent, who opened one of the packets at his office later the same day. Under the brown waxed paper were several layers of a thin blue cellophane-like material, two to three layers of a thicker white plastic milky colored material, and approximately two layers of a thin, clear sheet plastic material. Inside the wrappings was a dark, hard, compressed, vegetable type material, which was determined to be hashish. The nine packages contained approximately 20 pounds of hashish.

The district court denied Mehra's motion to suppress the warrantless search and seizure of the hashish. It held that Mehra and Far Eastern had no legitimate expectations of privacy in the packages of the drug and alternatively that Synthetic Finishing had sufficient authority to consent to the search and seizure. Mehra assigned error contending that he and his company had neither abandoned the drugs nor authorized Synthetic Finishing to consent.

II

The fourth amendment protects people rather than places, *Katz v. United States*, 389 U.S. 347, 353 (1967), but the capacity of a person to claim the protection of the fourth amendment depends upon a legitimate expectation of privacy in the invaded place or thing. This requires both that a person have exhibited an actual expectation of privacy and that the expectation be one that society recognizes as reasonable. *Katz v. United States*, 389 U.S. at 361 (Harlan, J., concurring). In assessing what is a constitutionally protected reasonable expectation of privacy, the Supreme Court has considered such factors

as the intention of the framers, the uses to which the person has put a location, and societal values and understandings about areas which deserve the fourth amendment's protection. *See Oliver v. United States,* 466 U.S. 170, 178 (1984).

The Supreme Court has upheld as legitimate not only the privacy rights of persons in places historically associated with the fourth amendment, such as the home, but also the privacy rights of persons in letters, sealed packages, and in closed, opaque containers, such as footlockers, suitcases, or packages whose contents are not inferable from their appearance. *See Robbins v. California,* 453 U.S. 420, 426-27 (1981). Thus, in *Walter v. United States,* 447 U.S. 649 (1980), on which Mehra relies, the Supreme Court upheld the privacy right of an owner of pornographic films who shipped them by private carrier. The films were labelled, then wrapped and sealed. The packages were erroneously delivered to a recipient who called the Federal Bureau of Investigation, and agents later projected the films without obtaining a warrant. The Court extended to this shipment the same fourth amendment rights afforded letters and sealed packages sent by mail and the same expectation of privacy granted to an ordinary locked suitcase. 447 U.S. at 654-55, n.5. The Court measured the consignor's expectation of privacy in the contents of a carton delivered by private carrier by the condition of the package when shipped, unless there was reason to assume the carton would be opened before reaching its destination. 447 U.S. at 658-59, n.12. Though the agents lawfully obtained the film, projection constituted an unlawful search. 447 U.S. at 654. In *Walter* and the other container cases in which the Court found a violation of the fourth amendment, the accused retained a legitimate expectation of privacy.

The critical issue in this case therefore is not simply whether the hashish was screened from detection by the opaque wrapping of the packets. It is whether Mehra and his company had a reasonable expectation of privacy in the packets.

This case presents no circumstances which justify a reasonable expectation of privacy. Without this expectation, there is no unconstitutional search. *See United States v. Jacobsen,* 466 U.S. 109, 113 (1984). Mehra's claim presents neither an actual nor a legitimate expectation of privacy. Unlike the films in *Walter,* Mehra's packets of hashish do not support the expectation of privacy that protects objects transported by mail or private carrier. For, unlike objects wrapped, packaged, and sent in a normal manner, the packets were placed and sent in a roll of cotton, a container that denies both the reasonable and actual expectation that it or anything within it could remain private. The nature and function of a roll of fabric is to be unrolled; its contents will inevitably be exposed. Such circumstances belie a reasonable expectation of privacy. The risky nature of his transaction does not support a reasonable inference that Mehra took normal precautions to maintain his privacy, and given the means he chose to import drugs, he could have had no reasonable subjective expectation that the roll and packets would remain free from governmental intrusion. *Cf. Rawlings v. Kentucky,* 448 U.S. 98, 103-06 (1980) (one who puts drugs in another's purse had no expectation of privacy).

Furthermore, the packets contained neither names nor addresses. In this respect they differed from pakages sent by mail or private carrier, which identify the possessory interest of the consignee. Mehra did not identify, or cause anyone else to identify, the possessory interest he now claims. Not until three years later--and then only through recorded conversations with an

employee--was Mehra's interest in the drugs established. One cannot reasonably expect privacy in anonymous packets concealed in imported fabric. The SBI agent's examination of the contents of the packets did not infringe any cognizable interest of Mehra or his company.

Inasmuch as we conclude that Mehra had no legitimate expectation of privacy in the roll of fabric, the packets, or the contents of the packets, we find it unnecessary to discuss the district court's alternative ground, which is based on Synthetic Fabric's consent, to the SBI agent's examination of the packets. It is sufficient to note that Synthetic Finishing did not infringe Mehra's constitutional rights by discovering the packets and delivering them to the agent. The fourth amendment does not proscribe private action undertaken without participation or knowledge of a government official. *See United States v. Jacobsen,* 466 U.S. at 113; *Burdeau v. McDowell,* 256 U.S. 465, 475 (1921).

III

In 1986 government agents, alerted by one of Mehra's employees, seized a large quantity of drugs concealed in rolls of fabric that Mehra had imported. Mehra contends that this search was illegal because the warrant authorizing it was based in part on the 1983 search. In view of our conclusion that the 1983 search was proper, the 1986 search was also valid.

IV

Mehra's evidentiary assignment of error merits little discussion. Mehra's employee, a government witness, testified about his suspicions that the imported fabrics contained drugs. Over Mehra's objection the government

agent testified that the employee had related his suspicions to the agent before Mehra was apprehended. The court admitted the testimony of the agent to corroborate the employee's statement. *See* Fed. R. Evid. 801(d)(1)(B). Mehra contends that admission of prior consistent statements was error because it was made after the employee had reason to fabricate in order to protect himself from arrest and deportation.

The employee's suspicions were fully corroborated by discovery of the 1986 shipment of drugs and Mehra's incriminating recorded conversations. The prior consistent statement added nothing of significance to the government's case. Admission of the statement, even if erroneous, presents no ground for reversal. *See* Fed. R. Crim. P. 52(a).

AFFIRMED.

Appendix B
Order of United States Court of Appeals

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
GREENSBORO DIVISION

UNITED STATES OF AMERICA

v.

BENARSI DAS MEHRA
and FAR EASTERN MERCHANTS, INC.

Cr-86-38-G

FILED July 8, 1986

ORDER

This matter is before the court upon both defendants' motion to suppress evidence seized in 1983 and 1986. The Government responded in opposition to the motion, and the court conducted a suppression hearing on June 4, 1986 at the United States Courthouse in Winston-Salem. At the conclusion of the hearing, the court denied defendants' motion to suppress and advised the parties that this formal order would follow in due course.

Background

On October 3, 1983, one hundred rolls of fabric were delivered to Synthetic Finishing Company for processing and backing. The fabric, purchased by Far Eastern Merchants, Inc. through its New York office, was imported from India and delivered to Far Eastern Merchants, Inc. at its High Point office. Prior to delivery to Synthetic Finishing Company, the fabric was sold to

Eastern Handwoven in New York. After completion of the processing and backing, the fabric was to be delivered to Eastern Handwoven.

During the processing of the fabric on October 7, 1986, Synthetic Finishing Company employees discovered nine packages inside a roll of unfinished fabric. The State Bureau of Investigation was notified, and fabric containing the packages was surrendered to the SBI by a principal of Synthetic Finishing Company. The packages were seized and opened, although no warrant was obtained. Tests indicated that the contents of the packages contained hashish.

In December 1985, Far Eastern Merchants, Inc., through its president, defendant Mehra, ordered approximately 10,000 pounds of fabric from an Indian company, Nitan International. In February 1986, Far Eastern Merchants, Inc. received the 126 bales of Indian fabric in its High Point office. Defendant Mehra directed that sixty specific bales be delivered to the New York office. On February 25, 1986, the High Point Police Department received information about the Indian fabric. The shipment was suspect because the fabric was identical to the fabric that contained hashish in 1983. After receiving permission from the office manager of the trucking company that was transporting the fabric to New York, a Greensboro police officer and his drug detection dog examined the shipment of fabric. The dog indicated the presence of controlled substances within the fabric on the truck. A search warrant subsequently was obtained, and a large quantity of hashish was found in the fabric.

Discussion

Defendants contend that evidence obtained from the 1983 search should be suppressed because a warrantless search was conducted without probable cause, and no

valid exception to the warrant requirement existed. Defendants further contend that no probable cause existed for the issuance of the search warrant in 1986 because the basis of the search warrant was the 1983 seizure of hashish and the reactions of a drug detecting dog. The court finds both contentions without merit.

1983 Search

The court finds that Synthetic Finishing Company officials had sufficient authority to consent to the seizure and search of the packages that were inadvertently discovered during the processing of fabric. After completion of the processing, the fabric was to be shipped to another company. Thus, it is clear that defendant Far Eastern Merchants, Inc. had relinquished any control over the fabric. Likewise, defendants had no legitimate expectation of privacy in the fabric that it delivered to Synthetic Finishing Company to be processed. *See United States v. Bellina*, 665 F.2d 1335 (4th Cir. 1981); *United States v. Jacobsen*, 466 U.S. 109 (1984).

1986 Search

The court finds that there was sufficient probable cause to justify the issuance of a search warrant by the federal magistrate. The use of a trained dog to detect drugs based upon reasonable suspicion of the presence of drugs may form the basis for probable cause. *See United States v. Place*, 462 U.S. 696 (1983). The fact that drugs were seized in 1983 from similar fabric as that found on the truck establishes the reasonable suspicion of drugs necessary to justify the use of a drug detecting dog.

Appendix B
Order of United States Court of Appeals

Based on the foregoing reasons, IT IS ORDERED that defendants' motion to suppress is DENIED *nunc pro tunc*.

/s/ _____
United States District Judge

July 8, 1986